In the Supreme Court of the United States

OCTOBER TERM, 1968

No. ——

UNITED STATES OF AMERICA AND FEDERAL
COMMUNICATIONS COMMISSION, PETITIONERS

v.

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION,
ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States and the Federal Communications Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in these three consolidated cases on September 10, 1968.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 9–48) is not yet officially reported. The Commission's memorandum opinions and orders adopting and revising the rules involved (Apps. C, D and E, *infra*, pp. 50–77) are reported at 32 F.R. 10303, 32 F.R. 11531 and 33 F.R. 5362.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1968 (App. B, *infra*, p. 49). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Federal Communications Commission has adopted rules codifying its policy requiring that a broadcast station afford an opportunity for reply to any person subjected to certain types of personal attack and to any political candidate against whom the station has editorialized. This case presents the question whether these rules and related policies are consistent with the First Amendment.

STATUTES AND REGULATIONS INVOLVED

Sections 4 (i) and (j), 303(r) and 315 of the Communications Act of 1934, as amended, 47 U.S.C. 154 (i) and (j), 303(r) and 315, are set forth in Appendix F, *infra*, pp. 79–80. The rules under review are also set forth in Appendix F, *infra*, pp. 81–83.

STATEMENT

On July 5, 1967, the Federal Communications Commission adopted rules, subsequently revised on August 2, 1967, and March 27, 1968, to codify the principles previously set forth in policy statements and *ad hoc* rulings with respect to the responsibility of broadcast stations to afford reply time when their facilities are used to attack persons or groups or when they editorialize on candidates in political campaigns.

The "personal attack" rule provides that if an attack is made upon the "honesty, character, integrity or like personal qualities" of an identified person or group in connection with discussion of a controversial issue of public importance, the licensee must notify the person or group attacked, transmit a script or tape of the attack (or an accurate summary if a tape is not available), and afford "a reasonable opportunity to respond over the licensee's facilities." Among certain exemptions from these requirements are attacks made in newscasts, news interviews and on-the-spot coverage of news events (including commentary or analysis, but not editorials, in such programs). In these exempt categories, notice and opportunity to respond need not be given to the person or group attacked if the licensee presents the contrasting viewpoint on the issue involved.

The "political editorial" rule provides that if a licensee editorializes with respect to political candidates, it must provide time for reply by any candidate opposed or not supported; it may require that this reply be made by a spokesman rather than the candidate himself, in order to avoid the creation of new reply rights in other candidates under Section 315 of the Communications Act, 47 U.S.C. 315. If such an editorial is broadcast within 72 hours before an election, notice must sufficiently precede the broadcast to give any candidate not supported "a reasonable opportunity to prepare a response and to present it in a timely fashion."

The principles underlying these rules had evolved as one aspect of the Commission's general Fairness Doctrine, which is based upon the public's right to be informed on public issues. The Commission early enunciated the policy that the several provisions of the Communications Act relating to enhancement of the public interest require a licensee to afford reasonable opportunity for the discussion of contrasting views on issues of public importance that he chooses to cover. *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 1250 (1949). This policy was confirmed by Congress in a 1959 amendment to the Communications Act.[1] In 1963, the Commission issued a policy statement setting forth the general substance of the "personal attack" principles now incorporated in the rules (25 Pike & Fischer R.R. 1899), and in 1964 it issued a "Fairness Primer" (29 F.R. 10415). However, prior to the promulgation of the rules here in question, the Commission had no generally available means of enforcing the policies of the Fairness Doctrine other than the ultimate sanction of refusal to renew a station's license whenever it might expire.

The Commission believed that codification of the "personal attack" principles in rule form was desirable in order to emphasize and define more precisely the obligations of licensees and to make available the more suitable direct sanctions of monetary forfeitures under 47 U.S.C. 503(b) in cases of willful or repeated noncompliance. The Commission had found that the procedures it had specified were not always followed even when flagrant personal attacks occurred (App. C, pp. 51–52, 55). It considered codification of the principles on political editorials similarly appropriate.

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[1] In amending Section 315 of the Communications Act to exempt certain news programs from the requirements of that section for "equal time" for candidates for public office, Congress further provided that:

"Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed on them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 73 Stat. 557.

The new rules were the subject of three separate petitions for review below, in Case No. 16369 by Radio Television News Directors Association, *et al.*, in Case No. 16,498 by Columbia Broadcasting System, Inc., and in Case No. 16,499 by National Broadcasting Company, Inc.[2] The cases were consolidated by order of October 24, 1967.

The court of appeals held that the rules unreasonably restrict free speech and set aside the Commission's order adopting them. It found that the requirements of notice and opportunity for reply impose excessive economic and practical burdens on the broadcasting of views on political candidates and controversial issues of public importance. In the court's view, these requirements, together with "the omnipresent threat of suffering severe and immediate penalties" for violations of the rules would lead to licensee self-censorship (App. A, pp. 28–30, 35–36). The court of appeals found "an even greater threat of Commission censorship" in what it considered insufficient specificity as to when the obligation of notice and opportunity for reply arises, compelling licensees to consult the Commission to determine their obligations in borderline cases (App. A, pp. 31–32). The court declined to accept any distinction between the broadcast press and the printed press with respect to the obligations that might be imposed (App. A, pp. 38–43). In view of its decision on the First Amendment question, the court did not decide the question whether Congress had authorized the Commission to promulgate such rules (App. A, p. 46).

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[2] The latter two petitions were transferred from the Second Circuit pursuant to 28 U.S.C. 2112.

The court of appeals' decision involved a direct disagreement with the decision of the Court of Appeals for the District of Columbia Circuit in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission,* 381 F. 2d 908, certiorari granted, 389 U.S. 968, upholding an *ad hoc* ruling by the Commission upon a complaint that a station failed to comply with the Fairness Doctrine in a "personal attack" situation. In *Red Lion,* the Commission had advised the station that it was obligated to offer the person attacked an opportunity to respond, and had improperly failed to inform him of the attack and send him a tape or transcript of the broadcast. Although this ruling bore no direct sanctions, the Court of Appeals for the Seventh Circuit viewed it as "essentially an anticipation of an aspect of the personal attack rules which are here being challenged" and thus considered it as an incorrect ruling (App. A, p. 38).

REASONS FOR GRANTING THE WRIT

The decision below is in conflict with a decision of the Court of Appeals for the District of Columbia Circuit on a question of major importance in the administration of the Communications Act. The decision of that court in *Red Lion Broadcasting Co., Inc.* v.

Federal Communications Commission, 381 F. 2d 908, certiorari granted, 389 U.S. 968, sustained the constitutional validity of the Fairness Doctrine and of the Commission's ruling on the requirements that Doctrine created in a specific personal attack situation. In this case, the Court of Appeals for the Seventh Circuit has held that rules codifying the Fairness Doctrine as applied to personal attacks are unconstitutional, stating its disagreement with *Red Lion* and setting up constitutional standards unlikely to be met by any conceivable rules.

Despite the conflict between the opinions of the courts of appeals, the decision of this Court in *Red Lion* will not necessarily determine the issues in the present case. Implementation of the Commission's personal attack policy by rules of general applicability and direct enforceability might be considered as involving questions distinguishable from those raised by the issuance of an *ad hoc* ruling bearing no direct sanctions. Moreover, the present case also involves the Commission's implementation of its reply policy on political editorials, which may not involve some of the issues involved in the policy on personal attacks. Accordingly, it is now appropriate that both cases be before the Court so as to permit full consideration of these issues.[3]

It is evident that this case, like *Red Lion,* presents questions of major importance in the administration of the Communications Act that should be settled by this Court. Although the court below stated that it was "not prepared" to hold the general Fairness Doctrine unconstitutional, its reasoning can only be read as an expression of serious doubt that the Doctrine could be properly applied in other contexts. Indeed, the approach taken by the court below may amount to a questioning of the validity of the provisions of Section 315 of the Act requiring stations to make equal time available to candidates for political office.

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[3] The Court last Term postponed oral argument in *Red Lion* pending the decision of the court of appeals and the filing of any petition for certiorari in this case. 390 U.S. 916.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
EDWIN M. ZIMMERMAN,
Assistant Attorney General.
GREGORY B. HOVENDON,
Attorney.

HENRY GELLER,
General Counsel,
DANIEL R. OHLBAUM,
Deputy General Counsel,
Federal Communications Commission,

NOVEMBER 1968.

APPENDIX A

In the United States Court of Appeals for the Seventh Circuit

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September Term, 1967—April Session, 1968

Nos. 16369, 16498, and 16499

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION,
ET AL., PETITIONERS
v.
UNITED STATES OF AMERICA AND FEDERAL
COMMUNICATIONS COMMISSION, RESPONDENTS

COLUMBIA BROADCASTING SYSTEM, INC., PETITIONER
v.
UNITED STATES OF AMERICA AND FEDERAL
COMMUNICATIONS COMMISSION, RESPONDENTS

NATIONAL BROADCASTING COMPANY, INC., PETITIONER
v.
UNITED STATES OF AMERICA AND FEDERAL
COMMUNICATIONS COMMISSION, RESPONDENTS

September 10, 1968

Petitions for Review of Orders of the Federal
Communications Commission

Before CASTLE, *Chief Judge,* KILEY and SWYGERT, *Circuit Judges.*

Swygert, *Circuit Judge.* This review raises the question of the constitutionality of the Federal Communications Commission's recently promulgated rules concerning the airing of personal attacks and political editorials by broadcasters licensed by the Commission. An unincorporated association of radio and television journalists and eight companies holding licenses for radio and television stations[1] petitioned this court to review and set aside the final order of the Commission,[2] issued on July 10, 1967, (adopted on July 5, 1967), which set forth the new rules.[3] The Columbia Broadcasting System, Inc., (CBS) and the National Broadcasting Co., Inc., (NBC) filed separate petitions to review the Commission's order in the Court of Appeals for the Second Circuit. These petitions were transferred to this court (28 U.S.C. § 2112), and pursuant to our order, the three petitions were consolidated.[4]

On April 8, 1966, the Commission released a Notice of Proposed Rule Making. The announced purposes of the rules proposed by the Commission were "to codify the procedures which licensees are required to follow in personal attack situations" and "to implement the *Times-Mirror*[5] ruling as to station editorials endorsing or opposing political candidates." In its notice, the Commission invited interested parties to file comments on the proposed rules. Of the twenty-six comments filed with the Commission, eighteen opposed and eight favored the adoption of the proposed rules.

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[1] These petitioners are Radio Television News Directors Association, Bedford Broadcasting Corporation, Central Broadcasting Corporation, The Evening News Association, Marion Radio Corporation, RKO General, Inc., Royal Street Corporation, Roywood Corporation, and Time-Life Broadcast, Inc. This group of petitioners will be collectively referred to hereafter as RTNDA.

[2] Commissioner Bartley dissented, Commissioner Loevinger concurred and Commissioner Wadsworth was absent.

[3] The rules as set forth in the July 10 order appear in the appendix to this opinion.

[4] Three amicus curiae briefs were filed in this court. The briefs of King Broadcasting Company and the National Academy of Television Arts and Sciences opposed the Commission's rules. The brief of the Office of Communication of the United Church of Christ and other religious organizations favored the Commission's rules.

In the rules dealing with the responsibilities and obligations of licensees with respect to personal attacks, a "personal attack" was defined as an attack upon the "honesty, character, integrity or like personal qualities of an identified person or group." A personal attack would come within the ambit of the rules, however, only if made "during the presentation of views on a controversial issue of public importance."

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[5] *Times-Mirror Broadcasting Co.* (KTTV), 24 P & F Radio Reg. 404 (1962). During the 1962 California gubernatorial campaign, a television station engaged in the " 'continuous' and 'repetitive' * * * presentation of views * * * on the campaign as compared to a 'minimal opportunity afforded to opposing viewpoints' and * * * from time to time, 'personal attacks on individuals and groups involved in the * * * campaign'." 24 P & F Radio Reg. at 405. The Commission informed the licensee:

> "Under the fairness doctrine, when a broadcast station permits, over its station facilities, a commentator or any person other than a candidate to take a partisan position on the issues involved in a race for political office and/or to attack one candiate or support another by direct or indirect identification, then it should send a transcript of the pertinent continuity in each such program to the appropriate candidates immediately and should offer a comparable opportunity for an appropriate spokesman to answer the broadcast." *Id.*

However, the Commission indicated that newscasts, news interviews, news documentaries, and on-the-spot coverage of news events "would not, as a general matter * * * appear to be encompassed by the Commission's ruling." *Id.* at 406.

According to the Commission's Memorandum Opinion and Order, the personal attack rules were "simply a particular aspect of the Fairness Doctrine," and did "not alter or add to the substance of the Doctrine." The Fairness Doctrine was initially articulated in the *Report of the Commission in the Matter of Editorialization by Broadcast Licensees,* 13 F.C.C. 1246 (1949). In that report, the Commission stated the basic obligation of licensees to present broadcasts concerning public issues, in a manner which would insure that the listening public would be exposed to a broad spectrum of views on a given issue.[6] The Commission indicated that "specific Congressional approval" of the Fairness Doctrine was contained in the 1959 Amendments to section 315 of the Communications Act.[7]

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[6] The specific language in the report which gave birth to the personal attack aspect of the Fairness Doctrine follows:

"It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. *The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist.*" (Emphasis added.)

When a personal attack has been broadcast by a licensee, the rules require that the licensee, within a reasonable time, but not later than one week after the attack, notify the person or group attacked of the "date, time and identification of the broadcast," provide "a script or tape (or an accurate summary if a script or tape is not available)," and offer to the person or group attacked "a reasonable opportunity to respond over the licensee's facilities."

Because "the procedures specified [in prior Commission rulings][8] have not always been followed [by licensees], even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue," the Commission perceived the need for the specific rules here at issue. The Commission's avowed purpose in embodying the procedural aspects of the "long-adhered to" personal attack principle in rules was twofold: first, to "clarify and make more precise the obligations of broadcast licensees where they have aired personal attacks"; and second, to enable the Commission "to impose appropriate forfeitures * * * in cases of clear violations by licensees which would not warrant designating their application for hearing at renewal time or instituting revocation proceedings but * * * do warrant more than a mere letter of reprimand."

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[7] That portion of the 1959 amendment to which the Commission referred follows (47 U.S.C. § 315):

"Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

[8] In particular, The Commission referred to the Public Notice of July 26, 1963; *Controversial Issue Programming*, F.C.C. 63-734 and Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415 (1964).

Although the promulgation of the rules represented an attempt to "clarify" a licensee's obligations, the Commission said that the "rules are not designed to answer such questions" as whether a "personal attack" had occurred or whether the person or group attacked was "identified." In spite of the fact that unanswered questions were to be left to the licensee's "good faith judgment," if the licensee remained doubtful of his obligations, the Commission invited prompt consultation to obtain interpretation of its rules.

Some of the comments submitted in opposition to the proposed rules contained expressions of fear that the rules would both discourage controversial issue programming and infringe the first amendment guarantee of a free press. With respect to the alleged discouragement of controversial issue programming, the Commission responded:

> Statements that the rules will discourage, rather than encourage, controversial programming ignore the fact that the rules do no more than restate existing substantive policy—a policy designed to encourage controversial programming by insuring that more than one viewpoint on issues of public importance are carried over licensees' facilities.

Regarding the constitutional question, which the Commission believed to be "without merit," it responded:

> As to these particular rules, we stress again that they do not proscribe in any way the presentation by a licensee of personal attacks or

> editorials on political candidates. They simply provide that where he chooses to make such presentations, he must take appropriate notification steps and make an offer for reasonable opportunity for response by those vitally affected and best able to inform the public of the contrasting viewpoint. That such rules are reasonably related to the public interest is shown by consideration of the converse of the rules—namely operation by a licensee limited to informing the public of only one side of these issues, *i.e.,* the personal attack or the licensee's editorial.

In addition, the Commission referred in this regard to the discussion of the "constitutionality of the fairness doctrine generally in the *Report on Editorialization,*" 13 F.C.C. 1246 (1949) and the decision in *Red Lion Broadcasting Co., Inc.* v. *FCC,* 381 F. 2d 908 (D.C. Cir.), *cert. granted,* 389 U.S. 968 (1967).[9]

Specific exemptions from the requirements of the personal attack rules were provided in two instances: attacks on "foreign groups or foreign public figures," and personal attacks by qualified candidates on other qualified candidates.[10] The latter exemption was thought to be appropriate in view of the "equal opportunities" provision of 47 U.S.C. § 315[11] with respect to broadcasts by political candidates.

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[9] On January 29, 1968, the Supreme Court entered an order postponing the oral argument in *Red Lion* pending the decision of this court in the instant review and the Supreme Court's action on any petition for certiorari to review this court's decision, 390 U.S. 916 (1968). On the same day, the Supreme Court denied the petition of RTNDA for certiorari before the judgment of this court, 390 U.S. 922 (1968).

[10] This exemption also included attacks by a candidate's authorized spokesmen or campaign associates on opposing candidates, their spokesmen or their campaign associates.

The Commission's purposes in promulgating the political candidate editorial rules was to clarify the "licensee's obligations in regard to station editorials endorsing or opposing political candidates." The rules require that a licensee who broadcasts an editorial endorsing or opposing a candidate for public office must offer the other qualified candidates or the candidate opposed "a reasonable opportunity * * * to respond."[12] The response can be made through a spokesman of the candidate's choice.[13] A twenty-four notification requirement was imposed because "time is of the essence in this area and there appears to be no reason why the licensee cannot immediately inform a candidate of an editorial." In those situations where a political editorial is broadcast within seventy-two hours of the day of election, the rules require notification before the broadcast. Although disclaiming any intention to prohibit "last-minute editorials," the Commission believed "such editorials would be patently contrary to the public interest and the personal attack principle" unless the candidate were notified sufficiently far in advance to present a timely response.[14]

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[11] In pertinent part, section 315 reads:

"(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

"(1) bona fide newscast,

"(2) bona fide news interview,

"(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

"(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection."

[12] The Commission elaborated on the phrase "reasonable opportunity to respond" in its memorandum opinion:

"The phrase: 'reasonable opportunity' to respond is used here and in the personal attack subsection because such an opportunity may vary with the circumstances. In many instances a comparable opportunity in time and scheduling will be clearly appropriate; in others such as where the endorsement of a candidate is one of many and involves just a few seconds, a 'reasonable opportunity' may require more than a few seconds if there is to be a meaningful response."

On August 7, 1967 the Commission[15] issued a Memorandum Opinion and Order (adopted on August 2, 1967), enlarging the specific exemptions from the requirements of the previously-adopted personal attack rules.[16] Under the amendment,[17] the personal attack rules were no longer applicable "to the bona fide newscast or on-the-spot coverage of a bona fide news event." The Fairness Doctrine, however, remained applicable to the exempt categories. The Commission considered the amendment necessary because the application of the specific personal attack requirements to these two news categories would be "impractical and might impede the effective execution of the important news functions of licensees or networks" by replacing news broadcasts with responses to personal attacks. The Commision exempted broadcast of on-the-spot coverage of a bona fide news event, because "this area is akin to the newscast area," personal attacks in such programs are "unlikely to be large in number, * * * the notification aspect is relatively less needed in this area," and application of the Fairness Doctrine in this area was sufficient.

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[13] The provision allowing the spokesman of the candidate to make the response was intended to enable the licensee "to avoid any Section 315 'equal opportunity' cycle" which might be initiated if the candidate himself responded.

[14] The rules issued on July 10, 1967 were to become effective on August 14, 1967.

[15] Commissioners Bartley, Loevinger, and Wadsworth were absent. Commissioner Cox concurred in the result.

[16] The respective petitions for review were supplemented to take account of the August 7 order.

[17] The amendment as set forth in the August 7 order appears in the appendix to this opinion.

"[E]ditorials or similar commentary, embodying personal attacks, broadcast in the course of newscasts," were specifically referred to in the Commission's memorandum opinion as not being exempt from the personal attack rules. If a licensee chose to present a personal attack in these broadcasts, the Commission believed that the licensee should not make the determination as to what the public would or would not hear in response to the personal attack. In addition, "time and practical considerations, discussed with respect to the news itself," were not thought to be germane to "editorials or similar commentary." The Commission did not exempt "news documentaries" from the personal attack rules because they were not thought to "involve the time and practical considerations" which necessitated the other exemptions and because "a documentary, even though fairly presented, may necessarily embody a point of view." "News interview shows" were not exempted because of the absence of "time and practical considerations" and because a licensee, having "chosen to provide one person with an 'electronic platform' for an attack" was required, by "elemental fairness and the duty to inform the public," to allow the person attacked to respond.

While the instant petitions were pending in this court, the Commission filed a motion requesting authority to once again revise the personal attack rules.[18] We granted the Commission's request, and on March 29, 1968, the Commission[19] issued a Memorandum

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[18] The Commission's motion was filed on March 4, 1968. As originally presented, the motion requested that this court hold the pending petitions for review in abeyance and authorize the Commission to conduct further rule making proceedings. According to the motion, the Commission proposed to "set aside those parts of the rules * * * dealing with personal attacks" and "to conduct an expeditious rule making proceedings looking toward their revision." The motion was apparently prompted by consultation between the Commission and the Department of Justice and a letter from the Assistant Attorney General, Antitrust Division, to the Commission's chairman. In pertinent part, the letter read:

"[W]e are fully prepared to support the Commission's position that the 'fairness doctrine' is constitutional and within the Commission's statutory powers, and that, as a general proposition, some special rule with regard to personal attack is a valid facet of that doctrine. However, we have some concern that the rule, as drafted, raises possible problems that might be minimized by appropriate revisions in the rule without materially interfering with the public interest objectives that the rule is intended to serve."

The motion was opposed by NBC. Neither RTNDA nor CBS had any objection to granting the motion so long as the enforcement of the rules, as originally promulgated, was stayed pending the proposed revision. In its reply, the Commission abandoned its plan to conduct additional rule making proceedings and instead appended a proposed memorandum opinion and order, revising the personal attack rules. This court's order of March 22, 1968 denied the Commission's motion to hold the review in abeyance but allowed the Commission leave to revise the personal attack rules.

[19] Commissioners Bartley and Loevinger dissented, the latter writing a lengthy opinion setting forth views critical of the Commissioner's action. Commissioner Cox concurred. Commissioner Johnson concurred in the result.

Opinion and Order (adopted on March 27, 1968) containing a revision of the personal attack rules. The revision[20] further enlarged the categories of news-related programs which would be exempt from the personal attack rules. The two added exemptions covered the "bona fide news interview" and the "news commentary of analysis contained" in either bona fide newscasts, bona fide news interviews, or on-the-spot coverage of a bona fide news event.

In the memorandum opinion accompanying the new revision, the Commission stated that the "revision * * * [was] of a relatively narrow nature,"[21] and was in response to allegations of the "inhibiting effects of the rules on the discharge of the journalistic functions of broadcast licenses." The Commission believed that its revision would avoid "*any* possibility of inhibition in these important areas of broadcast journalism" even though "the showing as to inhibiting effects remains speculative." (Emphasis in the original.)

Several additional considerations prompted the Commission to make the new revisions. First, noting the exemptions of four categories of news-type programs from the "equal opportunities" requirement of section 315,[22] the Commission observed that "the personal attack facet can have some similarities to the 'equal opportunities' requirement in its application in this area." Second, the Commission had not found, in the exempt news categories, the "flagrant failures by licensees to follow the requirements of the fairness doctrine" evident in "editorializing by licensees or syndicated programming." Third, the Commission desired "to promote the fullest possible robust debate on public issues."

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[20] The amendment as set forth in the March 29 order appears in the appendix to this opinion.

[21] The Commission did, however, attempt to impart some clarity to the requirements of the personal attack rules. In a footnote, the Commission said:

"Some other matters simply call for a common sense reading of the rule. Thus, if the person attacked has previously been afforded a fair opportunity to address himself to the substance of the particular attack, fairness and compliance with the rule have clearly been achieved. Similarly, as shown by the introductory phrase, 'when, during the presentation of views on a controversial issue of public importance * * *,' the rule is applicable only where a discussion of a controversial issue of public importance contains a personal attack which makes the honesty, integrity, or character of an identified person or group an issue in that discussion."

Although enlarging the scope of the exemptions, the Commission reiterated that the Fairness Doctrine (giving "the licensee considerable discretion") remained applicable to the exempt categories. In particular, when personal attacks occurred in the course of any of the exempt broadcasts, the Commission stated:

> [O]ur revision affords the licensee considerable leeway in these news-type programs but it still requires that fairness be met, either by the licensee's action of fairly presenting the contrasting viewpoint on the attack issue or by notifying and allowing the person or group attacked a reasonable opportunity to respond.

The "labelled station or network editorial" and the "news documentary" were not added to the group of exempt broadcasts. Although the Commission viewed "news commentary or analysis" to be "an integral and important part of the news process involved in the category 'bona fide newscast'" and viewed "the bona fide news interview" to be "a means of developing the news and informing the public which the Congress singled out in the 1959 Amendments [to section

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[22] See note 11, *supra*.

315],"[23] the "labelled station or network editorial" was viewed as "akin to * * * the political editorializing area." With respect to its reasons for not exempting news documentaries, the Commission could foresee "no factor of even *possible* inhibition in the case of a documentary, which is assembled over a period of time." (Emphasis in the original.) In addition, the Commission stressed that the documentaries exempted by Congress in section 315 were unique in that, "the appearance of the candidate is incidental to the presentation of the subject matter of the documentary; his rivals may have no connection with the program at all."

Petitioners' primary contention is that the Commission's personal attack and political editorial rules, as amended, will impose unconstitutional burdens on the freedom of the press protected by the first amendment.[24] The petitioners urge that a variety of such burdens will result from the Commission's enforcement of these rules. (1) A licensee will be unwilling to broadcast personal attacks and political editorials or to allow his facilities to be used as a vehicle for such broadcasts if he is required by the Commission's rules to incur the expense of notifying the person or group attacked, of providing a transcript of the attack, and of donating free time for a reply. This burden will be exacerbated by the potential disruption that the necessity of airing replies will have in displacing previously scheduled programs. (2) A conscientious licensee will be inhibited from speaking out on either controversial issues or impending elections if to do so means that he must provide time for the airing of unorthodox views in reply. (3) The broadcasting of controversial issues of public importance will be inhibited due to the licensee's uncertainty concerning the application of the Commission's rules to a given situation. (4) The licensee's journalistic judgment and spontaneity in programming will be impeded because the Commission's rules require the licensee to determine on a broadcast-by-broadcast basis whether compliance with the rules has been met. (5) An individual licensee affiliated with a network will be reluctant to carry a network program covered by the rules because if a response to a network program broadcast by the affiliate is required, the affiliate must either air the network's response or make independent arrangements to comply with the rules. (6) A licensee will be required to impose rigorous censorship on those who use his facilities since the licensee is individually responsible for all the material which he broadcasts.

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[23] Throughout its memorandum opinion, the Commission emphasized the parallel between its action and the 1959 Amendments. At one point the Commission said:

"We stress that the program categories being exempted are defined in the 1959 Amendments, and that the legislative guides as to these categories, to the extent pertinent, will be followed in this field also."

[24] RTNDA not only urges the unconstitutionality of the specific rules here in issue, but of the Fairness Doctrine itself.

Besides the alleged unreasonable burdens imposed upon licensees, the petitioners point to several additional difficulties which they argue inhere in the Commission's rules. They contend that the rules are too vague, given the wide range of severe penalties a licensee faces for failing to comply with them. Petitioners refer to the uncertain meaning of terms in the rules such as "attack," "character," "like personal qualities," and "identified individual." Moreover, they argue that the Commission's offer to make itself available promptly to resolve these interpretative questions could place the Commission in the role of a censor. Through the power to interpret vague rules, the Commission would be in a position to determine which views, opposing those expressed over a licensee's facilities, do or do not merit a right of reply. The petitioners claim that this discretionary power is susceptible to the possibility of abuse. In effect, they urge that the rules could result in the Commission substituting its judgment concerning what is to be broadcast for the judgment of individual licensees. The petitioners argue that in order to avoid this prospect, a licensee might attempt to either broadcast every side of every issue or curtail the broadcasting of controversial public issues and political editorials altogether. The result of each alternative would be a bland neutrality in the broadcasting media which petitioners urge is not in the public interest.

Neither the Commission's three memorandum opinions nor its brief filed in this court are altogether responsive to the various contentions raised by the petitioners. The Commission characterizes the petitioners' arguments as asserting "a constitutional right to make a one-sided presentation." This nonexistent constitutional right, according to the Commission, is predicated on the petitioners' failure to recognize the substantial differences between the various communication media, particularly the differences between newspapers and radio and television. Because of this failure, the Commission believes that the petitioners' arguments lead to the untenable conclusion that the entire licensing scheme of the Communications Act is unconstitutional. Although conceding that the first amendment applies to broadcasting, the Commission urges that "different rules and standards are appropriate for different media of expression in light of their differing natures." Finally, the Commission flatly asserts in a perfunctory fashion that under the rules as amended, there is no "possibility of inhibition" of licensees.

We approach the primary question raised in this review—the constitutionality of the Commission's personal attack and political editorial rules—against the backdrop of a host of Supreme Court decisions. Those decisions have established the standards by which to assess claims that governmental statutes, regulations or practices abridge freedom of speech in violation of the first amendment. For example, the Supreme Court has said: "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely, lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton* v. *Kentucky,* 384 U.S. 195, 200 (1966). "[S]tandards of permissible statutory vagueness are strict in the area of free expression. * * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP* v. *Button,* 371 U.S. 415, 432, 433 (1963).

Turning from cases dealing generally with the first amendment to cases dealing with the freedom of the press in particular, a series of recent Supreme Court decisions, beginning with *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), delineated the Court's views on the proper accommodation of the private interests served by libel actions in vindicating those who are defamed with the public interests served by the printed press in criticizing public officials or public figures and in illuminating public issues.[25] In the

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[25] Other decisions in which the Supreme Court explored the implications of *New York Times* are: *St. Amant* v. *Thompson,* 390 U.S. 727 (1968) (public official's defamation action after televised speech critical of him); *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967) (public figures' libel action after printed

New York Times case, a public official, one of the city commissioners of Montgomery, Alabama, brought a libel action against certain individuals and the Times as a result of critical statements appearing in a full page advertisement. After reviewing previous decisions, the Court said, "None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials." 376 U.S. at 268. The Court observed the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270. Nor was this commitment of recent origin, as, "The right of free discussion of the stewardship of public officials was * * * in Madison's view, a fundamental principle of the American form of government." 376 U.S. at 275. In ruling that actual malice must be the standard of proof in such libel actions, the Court said that under a less sringent standard:

> The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute * * *. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which First Amendment freedoms cannot survive. 376 U.S. at 277, 278.

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articles critical of them); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967) (action under right of privacy statute after publication of article concerning newsworthy people and events); *Mills* v. *Alabama*, 384 U.S. 214 (1966) (criminal action pursuant to Corrupt Practices Act after publication of a political editorial on election day); and *Garrision* v. *Louisiana*, 379 U.S. 64 (1964) (criminal action pursuant to Criminal Defamation Statute after criticism of public officials).

The import of *New York Times* and its progeny is that the freedom of the press to disseminate views on issues of public importance must be protected from the imposition of unreasonable burdens by governmental action. We address ourselves, therefore, to the question whether the Commission's rules here in issue pose unreasonable burdens on licensees.

Despite the Commission's disclaimers to the contrary, we agree with the petitioners that the rules pose a substantial likelihood of inhibiting a broadcast licensee's dissemination of views on political candidates and controversial issues of public importance.[26] This inhibition stems, in part, from the substantial economic and practical burdens which attend the mandatory requirements of notification, the provision of a tape, and the arrangement for a reply.[27]

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[26] The amicus curiae brief filed in this court by the King Broadcasting Company graphically illustrates the inhibitory effect on the broadcast of political editorials of the Commission's requirement of a "reasonable opportunity to respond." In two instances, the broadcast of editorials endorsing candidates for the Seattle City Council was delayed for several weeks while one of the unendorsed candidates in each instance prosecuted a complaint before the Commission alleging that King's division of that person's reply time was unreasonable. Although not ordering King to give the complaining candidates additional reply time, the Commission determined into how many segments the total amount of time should be divided. This action indicates the degree to which the Commission has gone in imposing supervision on licensees.

[27] The Commission's so-called exemptions from the requirements of the personal attack rules, which were contained in the August, 1967 and March, 1968 amendments, are illusory. Our reading of the latest amendment indicates that unless the response of the person attacked is fairly presented by the licensee on the "attack issue" of the "exempt" broadcast, the licensee must adhere to the explicit requirements of the rules. But, the alternative of presenting the reply on the "attack issue" might lead licensees to view every personal attack as a

Although most of the rules' specific requirements have been the subject of Commission rulings pursuant to individual complaints under the Fairness Doctrine, there are two crucial differences between the specific rules we are reviewing and that doctrine. A major premise underlying the Fairness Doctrine is the Commission's trust in the good faith and sensible judgment of a broadcast licensee in dealing with personal attacks and political editorials in a fair and reasonable manner.[28] Under the rules here in question, however, much of the licensees' discretion is replaced by mandatory requirements applicable to each broadcast. The other difference between the rules and the Fairness Doctrine is that the only sanction for noncompliance with the Fairess Doctrine is the possibility that a license will not be renewed if the Commission determines that granting a renewal will not serve the "public interest, convenience, and necessity." This determination and the accompanying sanction would be based on the licensee's overall performance during the preceding three years. Under the rules here in issue, however, the question whether a licensee would be subjected to the Commission's broad range of enforcement powers[29] could be determined on the basis

controversial public issue in order to avoid compliance with the strict requirements of the rules. Because of the possible disruptive effect and difficulty in complying with the alternative, a licensee might choose to avoid controversial issue programming altogether so as to remove the possibility of broadcasting personal attacks.

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[28] See note 6, *supra*.

[29] The Commission referred specifically to 47 U.S.C. § 503(b) in this regard in its memorandum opinion issued on July 10, 1967. In pertinent part, that section provides:

"(b) Violation of rules, regulations, etc.; * * *

"(1) Any licensee or permittee of a broadcast station who—

* * * * *

of a single broadcast by the licensee. As a consequence, whatever discretion is still reposed in a licensee under the new rules with respect to his handling of personal

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> "(B) willfully or repeatedly fails to observe any of the provisions of this chapter or of any rule or regulation of the Commission prescribed under authority of this chapter or under authority of any treaty ratified by the United States,
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> * * * * *
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> shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this chapter."

In addition, a willful and knowing violation of the Commission's rules will subject the violator to criminal sanctions, which are set forth in 47 U.S.C. § 502. In pertinent part, that section provides:

> "Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this chapter, * * * shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."

Finally, violations of the Commission's rules could subject a violator to administrative sanctions, which are set forth in 47 U.S.C. § 312. In pertinent part, that section provides:

> "(a) Revocation of station license or construction permit.
>
> "The Commission may revoke any station license or construction permit—
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> * * * * *
>
> for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;
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> * * * * *
>
> "(b) Cease and desist orders.
>
> "Where any person * * * (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action."

attacks and political editorials must be exercised in the face of the omnipresent threat of suffering severe and immediate penalties.[30]

We need not elucidate the proposition that the public interest will not best be served if the Commission's rules operate to discourage a licensee from engaging in the broadcast of controversial issues or political editorials. Moreover, the public interest will not necessarily best be served if a licensee adheres meticulously to the Commission's rules. Strict compliance with the rules might result in a blandness and neutrality pervading all broadcasts arguably within the scope of the rules. Apparently the Commission views programming which takes sides on a given issue to be somehow improper or contrary to the public interest. Thus, in explaining its failure to exempt documentaries from the personal attack rules, the Commission stated in its memorandum opinion of August 7, 1967, "that a documentary, even though fairly presented, may necessarily embody a point of view." This statement and the thrust of the rules themselves reflect an apparent desire on the Commission's part to neutralize (or perhaps to eliminate altogether) the expression of points of view on controversial issues and political candidates. Such a result would be patently inconsistent with protecting the invaluable function served by the broadcast press in influencing public opinion and exposing public ills.[31]

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[30] In its first memorandum opinion, the Commission said, "the *only* new requirement in these rules are the time limits." (Emphasis added.) A crucial difference between the rules and the Fairness Doctrine, however, is the fact that the licensee's obligations are incorporated in specific rules with which he must comply in every instance under the threat of severe sanctions.

[31] In *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966), the Supreme

In addition, the petitioners express fears that a licensee's strict adherence to the requirement that he provide an opportunity to reply might result in the public airing of obnoxious or extreme views. Of course, the Commission might take the position that a licensee need not comply in those situations. But allowing the Commission selectively to enforce the rules so as to prevent the expression of those views it believes to be contrary to the best interests of the American public would cast the Commission in the role of a censor, contrary to the express provisions of the Communications Act.[32]

An even greater threat of Commission censorship arises due to the lack of specificity in the rules. The Commission has invited a licensee to seek its advice whenever he is unsure of his obligations under the rules. In fact, the Commission itself has recognized the possibility that such situations will arise.[33] But if

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Court discussed the vanguard role of the press in the following language:

"Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials * * * responsible to all the people whom they were elected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free."

[32] 47 U.S.C. § 326, prohibiting Commission censorship of program content, provides:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

[33] See text *supra* at 7.

the rules are so unclear that a licensee needs to obtain advisory interpretations from the Commission, it follows that the Commission, through interpretation of its own vague rules, has the power to effectively preclude the expression of views, whether by a licensee or a respondent, with which it does not agree.[34]

We agree with the petitioners that such terms as "attack," "character," and "like personal qualities" are subject to diverse interpretations and applications. Besides the unclear meaning of these essential terms in the rules, the Commission has failed to articulate the meaning of the rules. That the rules have been twice amended since their initial promulgation (once even while the instant reviews were pending in this court)[35] suggests that the Commission's aims in promulgating the rules are uncertain and changing. In its initial memorandum opinion, the Commission illustrated a situation in which the obligations imposed by the personal attack rules would arise, namely, the making of "a statement in a controversial issue broadcast that a public official or other person is an embezzler or a Communist."[36] In its memorandum opinion accompanying the most recent revision of the rules, the Commission, in a footnote, redefined when the personal attack rules become applicable. The Commission said, "The rule is applicable only where a discussion of a controversial issue of public importance contains a personal attack which makes the honesty, integrity or character of an identified person or group an issue in that discussion." The Commission's first formulation suggests that any personal attack occurring during the course of a controversial issue broadcast is subject to the rules. The Commission's last formulation, however, suggests that only those personal attacks which are themselves an issue in the broadcast are subject to the rules.

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[34] "[I]n appraising a statute's inhibitory effect upon such [first amendment] rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar." *NAACP* v. *Button*, 371 U.S. 415, 432 (1963).

[35] The latest revision was prompted, according to an Assistant Attorney General, by a "concern that the rule, as drafted, raises possible problems that might be minimized by appropriate revisions."

[36] On previous occasions, the Commission has taken a different view on the rights of communists under the Fairness Doctrine. Thus, in the *Fairness Primer*, the Commission stated, "it is not the Commission's intention to require licensees to make time available to communists or the communist viewpoint." 29 Fed.

Another example of the Commission's uncertain position regarding a licensee's obligations under the rules concerns its treatment of personal attacks occurring during the course of editorials or commentary. When the Commission first amended the rules to exempt the "bona fide newscast" and "on-the-spot coverage of a bona fide news event," the Commission said in its accompanying memorandum opinion that the exemption was inapplicable to "editorials or similar commentary." The clear implication from the last quote language is that there is little, if anything, distinguishing "editorials" from "similar commentary." Yet in the memorandum opinion accompanying its last amendment to the rules, the Commission made a

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Reg. at 10418 (1964). The statement quoted in the text apparently suggests that the Commission has altered its view respecting communists. This apparent change of attitude on the Commission's part, however, indicates only that the Commission has been inconsistent in its application of the Fairness Doctrine. And if the rules are vague enough to require a licensee to seek Commission interpretations, there exists the possibility of further such inconsistencies in the future.

distinction between the two categories for it exempted "news commentary or analysis in a bona fide newscast" but left the "labelled station or network editorial" still subject to the rules.[37]

Similar uncertainty is evident in the Commission's treatment of the "news documentary." The Commission said in creating the various exemptions from the personal attack rules that it was "following the line drawn by Congress" when Congress created the exemptions in section 315. Congress exempted the news documentary, "if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary." Yet the Commission did not exempt the news documentary from the personal attack rules even though any personal attack which might occur would likewise be incidental to the subject of the documentary.[38] The Commission's explanation for its failure to treat news documentaries as Congress treated them in section 315 was expressed by the Commission in its last memorandum opinion: "[T]here is no factor of even

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[37] A "news commentary or analysis" broadcast "outside one of the exempt program categories" will still be subject to the Commission's rules. Thus, depending solely on when it is broadcast, the same commentary would be either exempt or not exempt. The Commission itself recognized this anomaly, explaining it by saying that the same result occurred under section 315 which it was following.

[38] There is some question whether the Commission's action in following the "line drawn by Congress" in section 315 was appropriate. Section 315 dealt with the problem of equal time for political candidates, not with the problem of personal attacks and political editorials. The fact that Congress exempted certain types of news-related programs from the equal time requirement in no way indicates what judgments Congress would have made (if in fact it could constitutionally have acted in this area at all) in deciding the scope of exemptions with respect to personal attacks and political editorials.

possible inhibition in the case of a documentary which is assembled over a period of time." (Emphasis in the original.) This explanation is debatable in view of the ever increasing pace of significant news developments and the valuable function served by documentaries in illuminating these developments.[39]

What these examples demonstrate is that the Commission's rules are too vague because they lack standards precise enough to enable a licensee to ascertain whether he is subject to the rules' obligations. When a licensee considers the vagueness of the rules, the mandatory and pervasive requirements of the rules, and the threat of suffering serious sanctions for noncompliance with them, it is likely that he will become far more hesitant to engage in controversial issue programming or political editorializing. Consequently, he will "steer far wider of the unlawful zone." *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958). Given the fast pace of news developments, a licensee will be understandably reluctant to make the difficult on-the-spot judgments demanded by the Commission's rules, the meaning of which are uncertain to both the licensee and the Commission. In *Farmers Union* v. *WDAY, Inc.,* 360 U.S. 525, 530 (1959), the Supreme Court commented on the practical difficulties facing licensees in an analogous situation concerning the censorship prohibition of section 315:

> The decision a broadcasting station would have to make in censoring libelous discussion by a candidate is far from easy. Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question, * * * Such is-

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[39] For a discussion of the problems of time and planning that attend the preparation of a news documentary, see W. Wood, Electronic Journalism, 46–49 (1967).

> sues have always troubled courts. Yet, under petitioner's view * * * they would have to be resolved by an individual licensee during the stress of a political campaign, often, necessarily, without adequate consideration or basis for decision. Quite possibly, * * * all remarks even faintly objectionable would be excluded out of an excess of caution.

In addition, due to a licensee's uncertainty of his obligations under the rules, it is more likely that he will engage in rigorous self-censorship of the material he broadcasts, than if he were subject only to the Fairness Doctrine.[40] Such self-censorship would restrict the dissemination of views on public issues—essential to an informed citizenry. In *Smith* v. *Califorina,* 361 U.S. 147, 154 (1959), the Supreme Court had occasion to comment on the evils of self-censorship, saying:

> The bookseller's self-censorship compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it the distribution of all books, both obscene and not obscene, would be impeded.

In response to the petitioners' attack on the rules, the Commission has advanced two arguments to support its position that the rules are constitutional. First, the Commission relies on the recent decision in ***Red Lion Broadcasting Co., Inc.*** v. ***FCC,*** 381 F. 2d 908 (D.C. Cir.), *cert. granted,* 389 U.S. 968 (1967). ***Red Lion*** concerned the challenge by a radio station licensee of a Commission order requiring the licensee to make free reply-time available to a person who had been personally attacked on a program broadcast over the licensee's station. The Commission's order predated the personal attack rules here in question.

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[40] The Commission has made clear that "the obligation for compliance with these rules is on each individual licensee." If a licensee offers the use of his facilities to others who make a personal attack, the licensee remains responsible for complying with the Commission's rules. Under these circumstances, a licensee might also undertake to censor what others broadcast over his facilities.

In correspondence with the licensee prior to the issuance of the order, the Commission indicated that the procedural requirements (later formalized in the new personal attack rules) should be complied with by the Red Lion radio station. The Commission wrote:

> The licensee, with the exception of appearances of political candidates, is fully responsible for all matter which is broadcast over his station, including broadcasts containing a personal attack. The latter is defined in our recent fairness primer as an attack "* * * on an individual's or group's honesty, character, integrity, or like personal qualities * * *' in connection with a controversial issue of public importance * * *.
>
> Where such an attack occurs, the licensee has an obligation to inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond.

The Commission also indicated in the course of this correspondence that its ruling was an application of the Fairness Doctrine, "as applied to this situation."

Judge Tamm, who wrote the principal opinion sustaining the Commission's order (Judge Fahy concurred in the result; Judge Miller did not participate in the decision on the merits), devoted the major portion of his discussion to a consideration of the constitutionality of the Fairness Doctrine. He held that Congress did not unconstitutionally delegate its legislative function to the Commission by enacting 47 U.S.C. § 315, which "adopted" the Fairness Doctrine, and he concluded:

> The Fairness Doctrine is not unconstitutionally vague, indefinite, or uncertain, nor does it lack the precision required in legislation affecting basic freedoms guaranteed by the Bill of Rights. * * * [And that] under the facts in this case, the requirement under the Fairness Doctrine that a broadcaster may not insist upon financial payment by a party responding to a personal attack does not violate the first and fifth amendments to the Constitution nor is the Doctrine violative of either the ninth and tenth amendments. 381 F.2d at 930.

We believe two observations are in order with reference to Judge Tamm's opinion and the holding in that case. First, we draw a distinction between the personal attack rules, whether incorporated in an *ad hoc* ruling such as occurred in *Red Lion* or in formal rules such as have now been promulgated by the Commission, and the Fairness Doctrine as referred to in section 315.[41] With that distinction in mind, we are not prepared to hold that the Fairness Doctrine is unconstitutional. Moreover, we do not believe that it is necessary to decide that question in this review. Second, we are in disagreement with the District of Columbia Circuit's holding in *Red Lion,* sustaining the Commission's order, inasmuch as we think that the order was esentially an anticipation of an aspect of the personal attack rules which are here being challenged.

Second, the Commission relies on the alleged difference between the broadcast press and the printed press to sustain its position that the rules are constitutional. Although the Commission denies that its rules either impose unreasonable burdens on licensees or raise any constitutional difficulties,[42] it does concede that "it is undisputed that the protections of the

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[41] See page 82, *supra.*

[42] In its three memorandum opinions, much of the Commission's discussion of the constitutional impact of its rules, apart

First Amendment apply to broadcasting." But this concession is diluted by the Commission's contention that the broadcast press is entitled to a lower order of first amendment protection than the printed press. The Commission argues (relying on *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943)) that "since radio is inherently not available to all, its use may be constitutionally regulated in the public interest."[43] What the Commission urges upon this court is the argument that once the need for some regulation of radio and television licensees is recognized—to insure that broadcasting facilities are in the hands of those most qualified and to eliminate interference and other technical problems—it must follow that the Commission's power extends to the promulgation of other kinds of regulations. According to the Commission, a failure to make this concession results in the

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from relying on *Red Lion*, is limited to a cryptic reference in its first memorandum opinion to paragraphs 19 and 20 of the 1949 *Report on Editorializing.* Those two general paragraphs, written almost twenty years ago, provide no answer to the constitutional issues raised here. Also inadequate are the frequent conclusional statements that the rules neither burden nor inhibit licensees. Categorical conclusions are no substitute for reasoned analysis. Finally, the Commission, in its brief filed in this court, fails to discuss the impact of *New York Times* and its progeny.

[43] *National Broadcasting Co., Inc.* v. *United States*, 319 U.S. 190 (1943), does not support the Commission's position that the broadcast press is not entitled to the same order of first amendment protection as the printed press. At issue in that case was the validity of the Commission's chain broadcasting regulations. The only constitutional issue raised there was whether the denial of a station license for engaging in certain network practices was a denial of free speech. Moreover, in the earlier case of *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 479 (1940), the Supreme Court said: "[T]he Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy."

Commission's inability to impose any regulations, technical or otherwise.[44] This argument begs the question at issue which is, whether the need for technical, financial, and ownership regulation of radio and television licensees sufficiently distinguishes this group from newspaper publishers so as to warrant sustaining the imposition of burdens on radio and television licensees which would be in flat violation of the first amendment if applied to newspaper publishers.

The characteristic most frequently advanced by the Commission to distinguish the printed press from the broadcast press is that radio and television broadcasting frequencies are not available to all. Data comparing the broadcast press and the printed press, however, shows that there are more commercial radio and television stations in this country than there are general circulation daily newspapers.[45] In most major metropolitan areas, there are several times as many radio and television stations as there are newspapers.[46]

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[44] Illustrative of the Commission's argument on this point is the assertion in its brief that "repeal of the Communications Act would still create chaos."

[45] In 1967 there were 6,253 commercial radio and television stations broadcasting as opposed to 1,754 daily newspapers. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1967, nos. 737, 746 (88th ed.).

[46] RTNDA has provided us with the following chart illustrating this point:

Standard Metropolitan Statistical Areas	Daily Newspapers	Broadcasting Stations on the Air—AM-FM-TV
Chicago	13	86
Milwaukee	3	32
Indianapolis	9	29
Peoria	2	11
Madison	2	15
Champaign-Urbana	2	12
Green Bay	1	8

(Source: U.S. Bureau of the Census, *County and City Data Book 1967* 636, 637, 672 (Statistical Abstract Supp.); *Editor and Publisher International Year Book—1967;* Television Digest, Inc., *Television Factbook* (Stations Vol., 1967 ed.); Broadcasting Publications, Inc., *1967 Yearbook Issue.*)

The Commission replies to this data by arguing that the only barrier to the publication of additional newspapers is an economic one, whereas the barrier to the operation of additional radio and television stations is a technical one—a limitation of available frequencies. For two reasons, the Commission's reply is unpersuasive. First, the fact that a number of allocated radio and television broadcast frequencies remain inoperative suggests that economic barriers also play a significant role in determining the number of operating broadcasters. Second, the recent availability of UHF television frequencies suggests that technological development is not at a standstill and may result in increasing further the availability of broadcasting frequencies in the future.

An additional characteristic is also advanced by the Commission to distinguish the broadcast press from the printed press. Since broadcasting licenses are not available to all and licenses are issued for a limited period of time, the Commission maintains that those who obtain licenses are granted a "privilege" and consequently must act as "trustee[s] for the public" since "the airwaves belong to the public." Therefore, according to the Commission, a licensee, exercising such a privilege, must abide by Commission imposed rules concerning personal attacks and political editorials.

The Commission's reliance on the concept of public ownership of space or airwaves to distinguish the broadcast press from the printed press is as one commentator has observed: "[L]ogically * * * meaningless. To say that the airways or spectrum can be owned by anyone is simply to indulge in fantasy."[47] Carried to its logical conclusion, the concept might sanction inhibitory regulation of other communication media for many such media make use of "publicly-owned" space to disseminate their respective messages. Moreover, the Supreme Court has indicated that "[A] State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP* v. *Button,* 371 U.S. 415, 429 (1963). The Supreme Court has applied this same principle to attempted infringements of freedom of the press. In one such case, *Hannegan* v. *Esquire, Inc.,* 327 U.S. 146, 156 (1946), concerning the denial of a second-class postal rate to a magazine, the Court said:

> [G]rave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. * * * Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. * * * [It would be] a radical departure from our traditions * * * to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country.

See also *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965).[48] Accordingly, the Commission cannot impose unreasonable burdens on a licensee's dissemination of views on controversial public issues by arguing that obtaining and exercising a broadcast license is a "privilege."

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[47] Robinson, *The FCC and the First Amendment: Observations on 40 years of Radio and Television Regulations,* 52 MINN. L. REV. 67, 1952 (1967). Professor Robinson's article, an insightful and, at times, critical analysis of the Commission's regulatory activities, was written after the decision in *Red Lion.*

[48] The Supreme Court has expressed the view on occasion that in determining the applicability of first amendment safeguards there is no basis for distinguishing among the various communication media. *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131, 166 (1948); *Lovell* v. *Griffin,* 303 U.S. 444, 452 (1938).

In view of the vagueness of the Commission's rules, the burden they impose on licensees, and the possibility they raise of both Commission censorship and licensee self-censorship, we conclude that the personal attack and political editorial rules would contravene the first amendment. Consequently, the rules could be sustained only if the Commission demonstrated a significant public interest in the attainment of fairness in broadcasting to remedy this problem, and that it is unable to attain such fairness by less restrictive and oppressive means. *Keyishian* v. *Board of Regents,* 385 U.S. 589, 602 (1967), and *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). We do not believe the Commission has made such a demonstration.

According to the Commission, "[T]he development of an informed public opinion through the public dissemination of news and ideas concerning the vital issues of the day is the keystone of the Fairness Doctrine" as well as the rules here in question. The Commission assumes, however, that television viewers and radio listeners are in fact ill-informed, that they are isolated from other media of communication, and that those other media do not fully inform them of all sides of controversial public issues. We do not believe this assumption is warranted. The Commission's rules apply only to controversial issues of public importance and to political candidate editorials. Thus, the rules deal with subjects which are likely to receive thorough exposure and illumination in all media of communication. Although we would agree that radio and television are major vehicles for the dissemination of views on controversial public issues, the Commission has failed to demonstrate that the exposure of all sides of a given issue is not achieved by radio and television in conjunction with other media of communication.

An important reason advanced by the Commission for promulgating the personal attack and political editorial rules was to broaden the range of available sanctions to deal with licensees who fail to comply with the requirements of the Fairness Doctrine. In its initial memorandum opinion, however, the Commission disclaimed any intention of using the rules "as a basis for sanctions against those licensees who in *good faith* seek to comply with the personal attack principle."[49] (Emphasis added.) When this disclaimer is added to the Commission's failure to demonstrate the existence of widespread noncompliance with the doctrine, it becomes evident that the Commission's rules are broader than necessary; for they impose substantial burdens on all licensees in the expectation of dealing more severly with a minority of licensees who engage in "willful or repeated" acts of unfairness.[50] In addition, there is some question whether the reply requirements of the rules are well-suited for attaining the fair presentation of all sides of controversial public issues which the Commission believes to be presently lacking. One commentator, considering the efficacy of the reply requirements, has observed:

> I think that the case for the value of the broadcast reply is much weaker than it is as-

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[49] The Commission's announced intention to enforce its rules selectively is no substitute for rules narrowly drawn to deal with a specific problem. For despite the disclaimer, a licensee still faces the possibility of suffering the imposition of severe penalties for noncompliance with the rules, thereby chilling the exercise of his first amendment rights.

[50] The sanctions available to the Commission under 47 U.S.C. §§ 312, 503(f) require willful or repeated violations by a licensee. The sanctions available under 47 U.S.C. § 502 require a willful and knowing violation by a licensee.

> sumed to be. Most attacks as I have said are received casually and without advance preparation by the listener. After he has heard it, will he be conditioned to expect, wait for, be alerted to a reply? How will the mandated reply or defense reach him? Does he know whether or when it will be broadcast? The advance programs do not give notice of specific replies (though it would be possible for the regulation to require such notice). It may seem something of a paradox but I would hazard the hypothesis that a reply in a newspaper, i.e., as a news item, is more likely to reach a listener than the later program. The newspaper both in time and space has greater extension and great permanency. JAFFE, THE FAIRNESS DOCTRINE, EQUAL TIME, REPLY TO PERSONAL ATTACKS, AND THE LOCAL SERVICE OBLIGATIONS; IMPLICATIONS OF TECHNOLOGICAL CHANGE 2 (U.S. Government Printing Office, 1968).

The petitioners also challenge the personal attack and political editorial rules on the ground that Congress has not authorized the Commission to promulgate them. They argue that the required explicit Congressional authority, essential in "areas of doubtful consitutionality," *Greene* v. *McElroy,* 360 U.S. 474, 507 (1959), is lacking. And even if it could not be determined that rules clearly abridge first amendment safeguards, they urge that sufficient constitutional doubt remains to invalidate the rules pursuant to the principle enunciated in *Green* v. *McElroy.*

The Commission has responded to this argument by calling attention to two provisions which it claims authorize the promulgation of the rules in question. First, it points to the "public interest" standard contained in the Communications Act, from which it finds the grant of authority to devise rules requiring fairness in the treatment of public issues, citing *National Broadcasting Co. Inc.* v. *United States,* 319 U.S. 190

(1943). Second, the Commission maintains that the 1959 amendment of section 315(a) of the Act, clearly and unmistakably conferred upon it authority to refine and implement the Fairness Doctrine which Congress had recognized and approved through the amendment.

Since we have determined that the rules here challenged collide with the free speech and free press guarantees contained in the first amendment, we need not resolve the authorization issue presented in this review.

The Commission's order adopting the personal attack and political editorial rules, as amended, is set aside.

APPENDIX

The full text of the Commission's rules issued on July 10, 1967 follows:

> Personal attacks; political editorials.
>
> (a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.
>
> (b) The provisions of paragraph (a) of this section shall be inapplicable to attacks on foreign groups or foreign public figures or where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesman,

or persons associated with the candidate in the campaign.

NOTE: In a specific factual situation, the fairness doctrine may be applicable in this general area of political broadcasts. See, Section 315(a) of the Act (47 U.S.C. 315(a)); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

The full-text of the Commission's amendment to the rules issued on August 9, 1967 follows:

(b) The provisions of paragraph (a) of this section shall be inapplicable (i) to attacks on foreign groups or foreign public figures; (ii) where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts or on-the-spot coverage of a bona fide news event (but the provisions shall be applicable to any editorial or similar commentary included in such newscasts or on-the-spot coverage of news events).

Note: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415.

The full text of the Commission's amendment to the rules issued on March 29, 1968 follows:

> (b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).
>
> **Note:** The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315(a) of the Act.

A true Copy:

Teste:

__________,

Clerk of the United States Court of
Appeals for the Seventh Circuit.

APPENDIX B

United States Court of Appeals for the Seventh Circuit

Chicago, Illinois 60604

Tuesday, September 10, 1968

No. 16369, 16498, 16499

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL
COMMUNICATIONS COMMISSION, RESPONDENTS

Petitions for Review of Orders of the Federal
Communications Commission

Before Hon. LATHAM CASTLE, *Chief Judge,* Hon. ROGER J. KILEY, *Circuit Judge,* Hon. LUTHER M. SWYGERT, *Circuit Judge.*

This cause came on to be heard on the petitions for review of orders of the Federal Communications Commission, and the record from the Federal Communications Commission, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the Federal Communication Commission's order adopting the personal attack and political editorial rules, as amended, be set aside, in accordance with the opinion of this Court filed this day.

APPENDIX C

Before the Federal Communications Commission

WASHINGTON, D.C. 20554

Docket No. 16574

In the Matter of Amendment of Part 73 of the Rules To Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to Political Candidates

Memorandum Opinion and Order

1. On April 6, 1966, the Commission adopted a notice of proposed rule making (FCC 66-291) to provide procedures in the event of certain personal attacks and where a station editorializes as to political candidates. This notice was published in the Federal Register of April 13, 1966 (31 F.R. 5710). Upon the request of the National Association of Broadcasters, the time for filing comments and reply comments was extended to June 20, and July 5, 1966, respectively (31 F.R. 6838, May 7, 1966).

2. Comments were timely filed by Carrol M. Barringer (WLCO), Bedford Broadcasting Corp. (WBIW), et al.,[1] Cape Fear Telecasting, Inc., Colo-

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[1] On July 8, 1966, Bedford Broadcasting Corp., et al., submitted, together with a motion to accept the Addendum, an Addendum to their comments, consisting of excerpts from an "Economic Analysis of Competition in the Daily Newspaper Business," prepared by Jesse Markham, Professor of Economics, Princeton University. No reason was given for the failure to submit the material in a timely fashion. The motion to accept the addendum is denied. (47 CFR 1.415(d).)

rado Broadcasters Association, Columbia Broadcasting System, Inc., Corinthian Television Corp., et al., Golden Empire Broadcasting Co., Griffin-Leake TV, Inc., Interstate Broadcasting Co., Meridith Broadcasting Co., Mutual Broadcasting System, Inc., Mission Broadcasting Co., National Association of Broadcasters, National Broadcasting Co., Inc., Storer Broadcasting Co., Trigg-Vaughn Stations, Inc., WIBC, Inc., and WPSD-TV, generally in opposition to the rules. Comments favoring the rules were received from the American Civil Liberties Union,[3] Joseph H. Chislow, International Typographical Union (AFL-CIO), Laborers' International Union of North America (AFL-CIO), National Council of the Churches of Christ, National Rifle Association of America, The Pacifica Foundation, and the United Steel Workers of America, AFL-CIO.

3. The purpose of embodying the procedural aspects of the Commission's long-adhered-to personal attack principle and political editorial policy in its rules is twofold. It will clarify and make more precise the obligations of broadcast licensees where they have aired personal attacks and editorials regarding political candidates. Further, in the event of failure to comply with these rules, the Commission will be in a position to impose appropriate forefeitures (section 503(b) of the Act) in cases of clear violations by licensees which would not warrant designating their applications for hearing at renewal time or instituting revocation proceedings but on the other hand do warrant more than a mere letter of reprimand. Of

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[3] The informal comments submitted by the A.C.L.U. reflect an apparent misreading of the proposed rules in that the comments state the "rule-making specifically exempts personal attacks in the context of the discussion of controversial issues * * *" In fact this is the situation expressly covered by the proposed rules.

course, pursuant to section 503(b) of the Act, only the willful or repeated violation, of these rules can result in forfeiture. We stress that the personal attack principle is applicable only in the context of the discussion of a controversial issue of public importance. See paragraph 10, infra.

4. These rules will serve to effectuate important aspects of the well established Fairness Doctrine; they do not alter or add to the substance of the Doctrine.[3] As set forth in the 1949 Report of the Commission in the Matter of Editorialization by Broadcast Licensees, 13 FCC 1246 at 1249 (1949), "the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day" is the keystone of the Fairness Doctrine. "It is this right of the public to be informed, rather than the right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting." Ibid. The Fairness Doctrine as a basic delineation of a standard of public interest in broadcasting was given specific Congressional approval in the 1959 amendment of section 315 (a) of the Communications Act, 73 Stat. 557, 47 U.S.C. 315(a). The personal attack principle is simply a particular aspect of the Fairness Doctrine. The principle stems from the Commission's language in the 1949 Report that "elementary consideration of fairness may dictate that time be allocated to person or group which has been specifically attacked over the station * * *" 13 FCC 1252. The standard of fairness

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[3] The only new requirement in these rules are the time limits, discussed in paragraphs 12 and 15, infra, within which licensees must act to fulfill their substantive obligations when they have broadcast personal attacks or political editorials.

similarly dictates that where a licensee editorializes for or against a candidate the appropriate spokesman for the conflicting point of view is the opposed candidate's representative, or, if the licensee so chooses, the candidate himself. "These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the general public." 1949 Report, supra, 13 FCC 1250.

5. Several of the parties contend that the Fairness Doctrine and the personal attack principle are unconstitutional infringements of broadcasters' rights of free speech and free press under the First Amendment. We believe these contentions are without merit. We have discussed the constitutionality of the fairness doctrine generally in the Report on Editorialization, 13 FCC 1246–1270. "We adhere fully to that discussion, and particularly the considerations set out in paragraphs 19 and 20 of the report." Letter to John H. Norris (WGCB), 1 FCC 2d 1587, 1588 (1965). The court in reviewing the constitutionality of the personal attack principle of the Fairness Doctrine in Red Lion,[4] concluded "that there is no abrogation of the petitioners' [licensees'] free speech right. * * * I find in the Fairness Doctrine a vehicle completely legal in its origin which implements by use of modern technology the 'free and general dicussion of public matters [which] seems absolutely essential for an intelligent exercise of their rights as citizens,' Grosjean v. American Public Press, supra at 249." Red Lion, supra, at 41. As to these particular rules, we stress again that they do not proscribe in any way the presentation by a licensee of personal attacks or editorials

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[4] Affirmed sub. nom., Red Lion Broadcasting Co., Inc. v. F.C.C., Case No. 19,938, D.C. Cir. (June 13, 1967).

on political candidates. They simply provide that where he chooses to make such presentations he must take appropriate notification steps and make an offer for reasonable opportunity for response by those vitally affected and best able to inform the public of the contrasting viewpoint. That such rules are reasonably related to the public interest is shown by consideration of the converse of the rules—namely, operation by a licensee limited to informing the public of only one side of these issues; i.e., the personal attack or the licensee's editorial.[5]

6. The addition of § 73.123 (a), (b) (and also 73.300–FM; 73.598—Educational FM; 73.679–TV of identical language) to the rules serves to codify what has long been the Commission's interpretation of the personal attack aspect of the Fairness Doctrine. Report on Editorialization by Broadcast Licensees, 13 FCC 1246, 1258 (1949); Clayton W. Mapoles, 23 Pike & Fischer, R.R. 586 (1962); Billings Broadcasting Co., 23 Pike & Fischer, R.R. 951 (1962). "Thus, we have repeatedly stated that when a licensee in connection with its coverage of a controversial issue, broadcasts a personal attack on an individual or organization, it must 'transmit the text of the broadcast to the person or group attacked * * * either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response.' Public Notice of July 26, 1963; Controversial Issue Programming, FCC 63–734 (emphasis supplied)." Springfield Television Broadcasting Corp., 4 Pike & Fischer, R.R. 2d 681, 685 (1965). This duty devolves upon the

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[5] In situations not involving a personal attack or an editorial on a political candidate, the licensee may of course exercise his good faith reasonable judgment as to the appropriate spokesman for a contrasting point of view which the licensee determines should be presented. 1949 Report, supra, 13 FCC at 1251.

licensee, because other than in the case of a broadcast by political candidates, the licensee is responsible for all material broadcast over his facilities.

7. As the notice pointed out, the Commission has set forth the obligation of a licensee when a personal attack occurs during the discussion of a controversial issue of public importance, i.e., the licensee must notify the individual or group attacked of the facts, forward a tape transcript or accurate summary of the personal attack, and extend to the individual or group attacked an offer of time for the broadcast of an adequate response. See Clayton W. Mapoles, 23 Pike & Fischer, R.R. 586 (1962); Billings Broadcasting Co., 23 Pike & Fischer, R.R. 951 (1962); Times-Mirror, 24 Pike & Fischer, R.R. 404 and 407 (1962); and Springfield Television Broadcasting Corp., 4 Pike and Fischer, R.R. 2d 681, 685 (1965); Radio De Land, Inc. (WJBS), 1 FCC 2d 935 (1965). We notified all licensees of their responsibility in this respect, by transmitting to them the July 26, 1963 Public Notice (FCC 63-734) and the 1964 Fairness Primer, supra. Despite such notification and the Commission's rulings, the procedures specified have not always been followed, even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue. It is for this reason that we now codify the procedures which licensees are required to follow in personal attack situations. These rules will in no way lessen the force and effect of the Fairness Doctrine as it obliges licensees who permit their facilities to be used for the discussion of controversial issue of public importance to afford a reasonable opportunity for the presentation of conflicting views. Nor do the detract in any manner from a licensee's duty not to "withhold from expression over his facilities relevant news or facts concerning a controversy or * * * slant or dis-

tort the presentation of such news." Report on Editorialization, supra.

8. The obligation for compliance with these rules is on each individual licensee as it is for compliance with the Fairness Doctrine generally. Capitol Broadcasting Co., 2 Pike & Fischer, R.R. 2d 1104 (1964). Where a personal attack or editorial as to a candidate on a network program is carried by the licensee, the licensee may not avoid compliance with the rules merely because the attack or editorial occurred on a network program. Of course, if the network provides appropriate notice and opportunity for response and the licensee carries such response, its obligation would be satisfied.

9. A major purpose of the rules is to clarify and make more precise the procedures which licensees are required to follow in personal attack situations. The long-applied standard of what constitutes a personal attack remains unaffected by this codification:

> [T]he personal attack principle is applicable where there are statements, in connection with a controversial issue of public importance, attacking an individual's or group's integrity, character, or honesty or like personal qualities, and not when an individual or group is simply named or referred to. Applicability of the Fairness Doctrine in the Handling of Controversial Issue of Public Importance, Public Notice of July 1, 1964, footnote 6.

Thus, no matter how strong the disagreement as to views may be, the personal attack principle is not applicable (See Letter to Pennsylvania Community Antenna Television Association, Inc., 1 FCC 2d 1610); it becomes applicable only where in the context of the discussion of a controversial issue of public importance, there is an attack on an individual's or group's integrity, etc., as noted above. As stated in the notice of proposed rule making, we recognize that in some circumstances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal attack has occurred in the context of a discussion of a controversial issue of public importance, or whether the group or person attacked is "identified" sufficiently in the context to come within the rule. The rules are not designed to answer such questions. When they arise, licensees will have to continue making good faith judgments based on all of the relevant facts and the applicable Commission interpretations.[6] As we stated in the notice of proposed rule making, the rule will not be used as a basis for sanctions against those licensees who in good faith seek to comply with the personal attack principle. We point out that in the analogous case of the equal opportunities provision of section 315, we have not employed sanctions in the situation where a licensee has a good faith, reasonable doubt as to the provision's applicability. The rules here are thus directed to situations where the licensees do not comply with the requirements of the personal attack principle as to notification and offer of time to respond, even though there can be no reasonable doubt under the facts that a personal attack has taken place (e.g., a statement in a controversial issue broadcast that a public official or other person is an embezzler or a Communist). Statements that the rules will discourage, rather than encourage, controversial programing ignore the fact that the rules do no more than restate existing substantive policy—a policy designed to encourage controversial programing by insuring that more than one viewpoint on issues of public importance are carried over licensees' facilities. See footnote 3, supra. Further we do not perceive any discouragement to controversial issue programing, except for a licensee who wished to present only one side of such programing—namely, the personal attack and not the response by the individual attacked.

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[6] In appropriate cases, licensees can and should promptly consult the Commission for interpretation of our rules and policies.

This would be the appropriate procedure should there arise a question of the applicability of the principle to a factual situation, such as the hypothetical one posed by the National Broadcasting Co.'s comments, of an attack made in the context of a discussion of controversial issue of public importance, which does not itself constitute such an issue. We note that in our experience thus far, the attack made in the context of the controversial issue has been germane to the issue.

10. Several of the comments in this proceeding indicate the mistaken impression that an attack on a specific person or group constitutes, itself, a controversial issue of public importance requiring the invocation of the Fairness Doctrine. This misconceives the principle, based on the right of the public to be informed as to the vital issues of the day, which requires that an attack must occur within the context of a discussion of a controversial issue of public importance in order to invoke the personal attack principle. The use of broadcast facilities for the airing of mere private disputes and attacks would raise serious public interest issue, but such issues are not the focus of the Fairness Doctrine.

11. Under the principle it has always been the duty of a licensee to forward to a person or group attacked notification of the attack and an offer of an opportunity to respond, rather than to await a request or complaint from the person attacked. The notification requirement is of the utmost importance, since our experience indicates that otherwise the person or group attacked may be unaware of the attack, and thus the public may not have a meaningful opportunity to hear the other side. Again the rule adds no new burden in this respect to the obligations of a broadcast li-

censee. If an unawareness of this obligation presently exists among licensee despite the Commission's language in Mapoles, Billings, Times-Mirror, Springfield Television, the public notice of July 25, 1963, and the 1964 Fairness Primer, this only highlights the need for the rule.

12. Paragraph (a) of the rule places specific procedural responsibilities on the licensee over whose facilities a personal attack has been broadcast. A licensee is required to send the attacked person or group, within a reasonable time and in no event later than 1 week after the attack, a notice of the attack which states when the attack occurred and contains an offer of a reasonable opportunity to respond. Along with the notice, he is required to send a tape, transcript or accurate summary of the attack to the attacked person or group. This time limit should be sufficient to allow a licensee to confer with counsel or with the Commission if there is doubt as to its obligation. In any event, in the doubtful situation, if the person who possibly has been attacked is notified promptly within the time limit and the licensee seeks clarification of his obligation from his counsel or the Commission, no sanctions would be imposed, because the matter is not finally resolved within the 1-week period. See paragraph 9, supra.[7] This 1 week outer time limit does not mean that such a copy should not be sent earlier or indeed, before the attack occurs, particularly where time is of the essence.

Other matters are left to the reasonable judgment of the licensee, good faith negotiations, and the Commission's interpretive rulings based on specific factual situations.[6]

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[7] As we stated in the notice of proposed rule making, where a licensee determines that a personal attack has not occurred but recognizes that there may be some dispute concerning this conclusion, he should keep available for public inspection, for a reasonable period of time, a tape, transcript or summary of the broadcast in question.

13. As we pointed out in the notice, following present policy (public notice of July 1, 1964 (Fairness Primer), FCC 64-611, 29 F.R. 10415, footnote 6) personal attacks on foreign groups or foreign public figures are excluded from coverage by the rule. Also excluded from coverage are personal attacks made by political candidates, their authorized spokesmen, or those associated with them in the campaign against other candidates, spokesmen, or persons associated with them in the campaign. The exclusion of attacks by candidates against other candidates recognizes that the "equal opportunities" provision of section 315—and not the personal attack principle—is usually applicable to this situation. The Fairness Doctrine may, of course, be applicable to particular factual situations in the political broadcast field. See, section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. 315(a); public notice of July 1, 1964, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 F.R. 10415 (1964).

14. Finally, subsection (c) of the rule clarifies licensee's obligations in regard to station editorials endorsing or opposing political candidates. The appropriate candidate (or candidates) must be informed of a station's editorial opposing his (or their) candidacy or supporting the candidacy of a rival, and must be offered a reasonable opportunity to respond through a spokesman of his choice including, if the licensee so

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[6] Where the attack occurs on paid time, a question has arisen as to whether the response can also be required to be on paid time. We have ruled on this matter in Letter to John H. Norris (WGCB), aff'd sub nom., Red Lion Broadcasting Co., Inc. v. FCC, *supra*. In view of our ruling, this is a matter not covered by the rule.

agrees, himself. The language of subsection (c) has been altered from that appearing in the notice of proposed rule making (FCC 66–291) to make clear that where an editorial endorses a candidate notice and offer of an opportunity to respond must be sent to his opponent, and where an editorial opposes a candidate such notice and offer must be sent to the opposed candidate.

15. The phrase "reasonable opportunity" to respond is used here and in the personal attack subsection because such an opportunity may vary with the circumstances. In many instances a comparable opportunity in time and scheduling will be clearly appropriate; in others such as where the endorsement of a candidate is one of many and involves just a few seconds, a "reasonable opportunity" may require more than a few seconds if there is to be a meaningful response. See, Final Report of the Senate Committee on Commerce, S. Rep. No. 944, 87th Cong., second sess., Part 6, page 7. Notification shall be within 24 hours of the editorial, since time is of the essence in this area and there appears to be no reason why the licensee cannot immediately inform a candidate of an editorial. In most cases licensees will be able to give notice prior to the editorial. Indeed such prior notice is required in instances of editorials broadcast close to the election date; i.e., less than 72 hours before the day of the election. For while such last-minute editorials are not prohibited, we wish to emphasize as strongly as possible that such editorials would be patently contrary to the public interest and the personal attack principle unless the licensee insures that the appropriate candidate (or candidates) is informed of the proposed broadcast and its contents sufficiently far in advance to have a reasonable opportunity to prepare a response and to have it presented in a timely fashion. We have

accordingly made this requirement explicit in a proviso to subsection (c).

16. As in the case of the personal attack subsection the licensee may impose reasonable limitations on the reply, such as requiring the appearance of a spokesman for the candidate to avoid any section 315 "equal opportunities" cycle.[9] The matter of scheduling responses is left to reasonable judgment and negotiation. Subsection (c) is directed only to station editorials endorsing, or opposing, political candidates. Situations containing aspects of both personal attacks and political endorsements or oppositions may arise, and in such cases rulings on the particular factual settings may be necessary. Times-Mirror, 24 Pike & Fischer, R.R. 404 and 407 (1962).

17. Authority for the rules herein adopted is contained in section 4 (i) and (j), 303(r) and 315 of the Communications Act of 1934, as amended.

18. *Accordingly, it is ordered,* That the rules contained below are adopted, effective August 14, 1967.

(Secs. 4, 303, 315, 48 Stat. as amended 1066, 1082, 1088; 47 U.S.C. 154, 303, 315.)

Adopted: July 5, 1967.
Released: July 10, 1967.

FEDERAL COMMUNICATIONS
COMMISSION,[10]

[SEAL] BEN F. WAPLE, *Secretary*.

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[9] Barring extraordinary circumstances, the choice of the spokesman is, of course, a matter for the candidate involved.

[10] Dissenting statement of Commissioner Bartley and concurring statement of Commissioner Loevinger filed as part of original document; Commissioner Wadsworth absent.

In Part 73, §§ 73.123, 73.300, 73.598, and 73.679 all to read identically are added to read as follows:

§ 73.____ Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall be inapplicable to attacks on foreign groups or foreign public figures or where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesman, or persons associated with the candidates in the campaign.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or

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NOTE: In a specific factual situation, the fairness doctrine may be applicable in this general area of political broadcasts. See, section 315(a) of the Act (47 U.S.C. 315(a)); public notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 Fed. Reg. 10415.

tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

APPENDIX D

Before the Federal Communications Commission

WASHINGTON, D.C. 20554

Docket No. 16574

IN THE MATTER OF AMENDMENT OF PART 73 OF THE RULES TO PROVIDE PROCEDURES IN THE EVENT OF A PERSONAL ATTACK OR WHERE A STATION EDITORIALIZES AS TO POLITICAL CANDIDATES

Memorandum Opinion and Order

1. On July 5, 1967, the Commission adopted rules specifying procedures in the event of certain personal attacks and where a station editorializes as to political candidates. In subsection (b) of those rules, we exempted certain situations where the fairness doctrine generally, rather than the personal attack rule, may be applicable. In the processing of a recent complaint, we have become aware of a further instance where clarification of our rules is appropriate.

2. Specifically, the personal attack rule is inapplicable to the bona fide newscast or on-the-spot coverage of a bona fide news event. In these situations the general fairness doctrine is applicable, and licensees are required to make reasonable good faith judgments upon the particular facts of the case in accordance with that doctrine. See section 315(a) of the Communications Act of 1934, as amended; Applicability of the Fairness Doctrine In The Handling Of Controversial Issues of Public Importance, 29 F.R. 10416. Thus, licensees must make good faith, journalistic

judgments as to what is newsworthy and how it should be presented. If the licensee adjudges an event containing a personal attack to be newsworthy, in practice he usually turns, as part of the news coverage to be presented that day or in the very near future, to the other side and again makes the same good faith journalistic judgment as to its presentation and what fairness requires in the particular circumstances. That is normal journalism and fairness in this area. To import the concept of notification within a week period, with a presentation of the person attacked on some later newscast when other news might normally be broadcast, is impractical and might impede the effective execution of the important news functions of licensees or networks. Such a result is not intended under the rules adopted. Finally, the exemption is also being extended to on-the-spot coverage of a bona fide news event, since this category is akin to the newscast area; in this connection, we have also taken into account the consideration that the number of personal attacks occurring in on-the-spot coverage of bona fide news events is unlikely to be large in number, that the notification aspect is relatively, less needed in this area, and that on the whole it can be administered readily by applying the fairness doctrine to the specific facts of each case, when and if disputes arise.

3. The exemption resulting from the above clarification does not extend, however, to editorials or similar commentary, embodying personal attacks, broadcast in the course of the newscasts. The foregoing considerations are inapplicable. Rather, since the licensee has chosen to present a personal attack in his editorial, he should not be the one to determine wholly what the public shall or shall not hear on the other side of a matter affecting the integrity, honesty, and like personal qualities of the person attacked. Under

elemental fairness, the person attacked should be afforded a comparable opportunity to give that side, subject to reasonable conditions set by the licensee. See, e.g., Letter to Station WALG, FCC 65–50 (1965). More important, the person attacked is the most appropriate spokesman to inform the public of the other side of the attack issue. As noted, the time and practical considerations, discussed with respect to the news itself in par. 2, are not usually applicable to an editorial, and even if applicable in an attenuated form, are outweighed by the foregoing factors. Finally, the argument that this might impede the presentation of editorials containing personal attacks is simply an assertion by the licensee that he wishes to broadcast such an editorial, but only if he does not have to present the other side of the attack issue or if he can wholly control what the public may hear concerning this other side, rather than permitting the person so vitally affected by his editorial and with the most knowledge of the issue a reasonable opportunity to reach his listeners.[1]

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[1] For similar reasons, we have exempted news documentaries. We note that the latter ordinarily do not involve the time and practical considerations discussed in par. 2, and that a documentary, even though fairly presented, may necessarily embody a point of view. We believe, therefore, that the person attacked can readily, and should be, afforded the reasonable opportunity to present his side, as the most appropriate spokesman to inform the public on a matter affecting his integrity, etc.

Similarly, the news interviews show, which is akin to many other talk programs, is not exempted. The licensee has chosen to provide one person with an "electronic platform" for an attack, and elemental fairness and the duty to inform the public in the most appropriate manner, dictate that he should afford the person attacked a comparable opportunity. Again, the considerations set forth in par. 2 are inapplicable.

Finally, we note that there are already certain exemptions where the attacks are made by legally qualified candidate, their

4. It may be that experience will indicate the need or desirability of other revisions, clarifications, or waivers of the rule in particular factual situations. If so, we shall act promptly to make whatever changes the public interest in the larger and more effective use of radio requires. See, e.g., section 4(b), Administrative Procedure Act. We stress again the purpose of the rules: To delineate better the licensee's responsibilities in this important area and to afford the Commission a further needed sanction to deal with those who flagrantly violate the underlying policies in situations where there is no reasonable question as to the licensee's responsibility.

5. Authority for the rules herein adopted is contained in sections 4 (i) and (j), 303(r) and 315 of the Communications Act of 1934, as amended; see also, § 1.108 of the Commission's rules and regulations.

6. *Accordingly, it is ordered,* That the rule revisions contained below are adopted, effective August 14, 1967. See section 4(c), Administrative Procedure Act. This proceeding is terminated.

(Secs. 4, 303, 315, 48 Stat. as amended 1066, 1082, 1088; 47 U.S.C. 154, 303, 315.)

Adopted: August 2, 1967.

Released: August 7, 1967.

FEDERAL COMMUNICATIONS COMMISSION,[2]

[SEAL] BEN F. WAPLE, *Secretary.*

In Part 73 of Chapter I of Title 47 of the Code of Federal Regulations, §§ 73.123(b), 73.300(b), 73.598

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authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the compaign.

[2] Commissioners Bartley, Loevinger, and Wadsworth absent; Commissioner Cox concurring in the result.

(b), and 73.679(b) are revised to read identically as set forth in § 73.123 below:

§ 73.123 Personal attacks; political editorials.

* * * * *

(b) The provisions of paragraph (a) of this section shall be inapplicable (1) to attacks on foreign groups or foreign public figures; (2) where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts or on-the-spot coverage of a bona fide news event (but the provisions shall be applicable to any editorial or similar commentary included in such newscasts or on-the-spot coverage of news events).

NOTE: The fairness doctrine is applicable to situations coming within (3), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (2), above. See, section 315(a) of the Act, 47 U.S.S. 315(a); Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 Fed. Reg. 10415.

APPENDIX E

Before the Federal Communications Commission

WASHINGTON, D.C. 20554

Docket No. 16574

IN THE MATTER OF AMENDMENT OF PART 73 OF THE RULES TO PROVIDE PROCEDURES IN THE EVENT OF A PERSONAL ATTACK OR WHERE A STATION EDITORALIZES AS TO POLITICAL CANDIDATES

Memorandum Opinion and Order

1. On March 8, 1968, the Commission and the Department of Justice requested the Court of Appeals for the Seventh Circuit to hold in abeyance the cases pending before it seeking review of our personal attack and political editorial rules (Radio Television News Directors Assn., et al. v. United States, Case Nos. 16,369; 16,498; and 16,499), and to authorize the Commission to revise the personal attack rules. Such authority was granted by the Court, by order dated March 22, 1968, and this memorandum opinion and order deals with that revision. Since the revision is of a relatively narrow nature[1] and directed only to

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[1] Some other matters simply call for a common sense reading of the rule. Thus, if the person attacked has previously been afforded a fair opportunity to address himself to the substance of the particular attack, fairness and compliance with the rule have clearly been achieved. Similarly, as shown by the introductory phrase, "when, during the presentation of views on a controversial issue of public importance * * *", the rule is applicable only where a discussion of a controversial issue of public importance contains a personal attack which makes the honesty, integrity, or character of an identified person or group an issue in that discussion.

subsection (b) of §§ 73.123, 73.300, and 73.598, we shall not repeat the discussion in our prior opinions pertinent to subsections (a) and (c).[2] In short, we remain of the same view as to the legality and desirability of the personal attack rule, and are revising only one portion of it. See Red Lion Broadcasting Co. v. United States, 381 F. 2d 908 (C.A.D.C.), certiorari granted 88 Sup. Ct. 470.

2. The issue with which we are concerned here is the alleged inhibiting effects of the rules on the discharge of the journalistic functions of broadcast licensees. Even on the basis of the materials presented by the Columbia Broadcasting System (CBS) to the Court for the first time, the showing as to inhibiting effects remains speculative. But in view of the policy considerations discussed below, we believe that a revision would be appropriate.

3. We have consistently sought to promote the fullest possible robust debate on public issues. See letter to Storer Broadcasting Co., January 31, 1968, FCC 68-120. We have also stated our belief that the fairness doctrine promotes that goal. Ibid. CBS does not dispute the latter, but does claim, inter alia, that the personal attack facet of the doctrine inhibits the discharge of important broadcast journalistic functions in areas such as news analysis or commentary by its newsmen or the presentation of controversial public figures on its news shows. As in the case of the 1959 Amendments to section 315, what is called for is "balancing public policy considerations" (H. Rept. No. 802, 86th Cong., 1st sess., p. 4). On the one hand, we take into account the considerations set forth in our prior discussion pertinent to this claim (see memoran-

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[2] See memorandum opinions and orders, 8 F.C.C. 2d 721 (July 5, 1967; 32 F.R. 10303) and 9 F.C.C. 2d 539 (Aug. 2, 1967; 32 F.R. 11531).

dum opinion and order, 9 F.C.C. 2d 539, n. 1) and our assessment of the present showing in this respect as to inhibitions. On the other hand, there are two important considerations which, taken together, do make the case for revision:

(a) The 1959 Amendments to section 315 stressed the importance of broadcast journalism in informing the public "with respect to political events and public issues" (H. Rept. No. 802, 86th Cong., 1st sess., p. 4) and, on that basis, exempted four categories of programs—bona fide newscasts, news interviews, and news documentaries, and on-the-spot coverage of bone fide news events—from the "equal opportunities" requirement of section 315, stating that the fairness doctrine would remain applicable. While there are practical differences in its impact, the personal attack facet can have some similarities to the "equal opportunities" requirement in its application in this area.

(b) We have not had problems in this area over our many years of applying the fairness doctrine. For example, the 1959 exemption has worked well with respect to political candidates and the fairness afforded them in these news-type programs. As a general matter, unlike areas such as editorializing by licensees or syndicated programing where we have found some flagrant failures by licensees to follow the requirements of the fairness doctrine with respect to personal attacks, there has been no similar pattern of abuses in these news categories. This may well stem from the consideration that what is involved is news gathering or dissemination—an area where the licensee must be scrupulously fair. See Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1254–55. As the Senate Report (No. 560, 86th Cong., 1st sess.) stated in 1959, at page 11:

> It should be noted that the programs that are being exempted in this legislation have one

thing in common. They are generally news and information-type programs designed to disseminate information to the public and in almost every instance the format and production of the program is under the control of the broadcast station, or the network in the case of a network program.

In light of the above two considerations, we have decided to strike the balance in favor of exempting these news program categories, other than the news documentary. Such action avoids any possibility of inhibition in these important areas of broadcast journalism, without appearing to raise any greater problem of abuse than was the case in the 1959 exemption as to "equal opportunities." The fairness doctrine remains specifically applicable to these programs. See section 315(a); H. Conf. Report No. 1069, 86th Cong., 1st sess., p. 5; see paragraph 5, below.

4. We are expanding the exemptions in (iii) of subsection (b) to include the bona fide news interview and news commentary or analysis in a bona fide newscast. Such commentary or analysis is an integral and important part of the news process involved in the category "bona fide newscast." The bona fide news interview is similarly a means of developing the news and informing the public which the Congress singled out in the 1959 Amendments and as to which factor (b) in the above paragraph is applicable.[3] We have not exempted the labelled station or network editorial, even if occurring in one of these exempt categories. Where a licensee's editorial discussing an issue of pub-

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[3] We stress that the program categories being exempted are defined in the 1959 Amendments, and that the legislative guides as to these categories, to the extent pertiment, will be followed in this field also. (See, e.g., H. Rept. No. 1069, 86th Cong., 1st sess., p. 4, as to the legislative history of the term "bona fide news interview.")

lic importance contains a personal attack which makes the honesty, integrity, or character of an identified person or group an issue in the discussion, his action is akin to that in the political editorializing area. We have stated that the licensee has the right to editorialize (see Hearing before a Subcommittee of the House Interstate and Foreign Commerce Committee, 88th Cong., 1st sess., pp. 83–94), but that right carries, we believe, the concomitant duty in these two instances of notifying the appropriate group, person, or candidate attacked and offering an opportunity to respond. See paragraph 3, memorandum opinion and order, 9 F.C.C. 2d 539.[4] We note that in this area we have found instances of failure to comply fully with the requirements of the fairness doctrine. Finally, as stated, we have not exempted the news documentary. The section 315 exemption is limited to bona fide news documentaries where the appearance of the candidate is incidental to the presentation of the subject matter of the documentary; his rivals may have no connection with the program at all. In the case where the licensee presents a documentary which makes the honesty, integrity, or character of a person an issue in its discussion of some controversial issue, the response of the person attacked is clearly germane and important to informing the public fully. There is no factor of even possible inhibition in the case of a documentary, which is assembled over a period of time. Rather, the matter is one where the person's response can be readily obtained and, indeed, we would expect this to be the usual practice. See note 4, supra.

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[4] We note that this duty is recognized in the industry. Thus, in 1963 the President of CBS told a Congressional committee that in 99 cases out of 100 CBS would try to get the subject of an adverse CBS editorial to reply, the 100th case being one where someone might want to come on and use foul language or other improper behavior. (1963 House Hearings on Broadcast Editorializing, pp. 266–267.)

5. As stated, the fairness doctrine is applicable to these exempt categories. Under that doctrine, the licensee has an affirmative duty generally to encourage and implement the broadcast of contrasting viewpoints (paragraph 9, Report on Editorializing by Broadcast Licensees, 13 F.C.C. at p. 1251). The licensee has considerable discretion in choosing ways to discharge that affirmative duty. See Letter to Capital Broadcasting Co., Inc. (WRAL), July 29, 1964, FCC 64–774. In the case of the personal attack there is not the same latitude. Under our revision with respect to the exempt categories, the licensee may choose fairly to present the viewpoint of the person or group attacked on the attack facet of the issues; in that event, and assuming that the licensee has acted reasonably and fairly, the doctrine is satisfied. But if the licensee has not done so or made plans to do so, the affirmative duty referred to above comes into play. And here it obviously is not appropriate for the licensee to make general offers of time for contrasting viewpoints, either over the air or in other ways in his community. There is a clear and appropriate spokesman to present the other side of the attack issue—the person or group attacked. Thus, our revision affords the licensee considerable leeway in these news-type programs but it still requires that fairness be met, either by the licensee's action of fairly presenting the contrasting viewpoint on the attack issue or by notifying and allowing the person or group attacked a reasonable opportunity to respond.

6. In sum, since our goal is to encourage robust, wide-open debate, we have reexamined the question presented here, and have concluded that the application of the personal attack principle to these news-type programs can be more limited, thus simplifying

the licensee's responsibility in fulfilling his journalistic functions without materially interfering with the public interest objectives of the personal attack principle. In so doing, we further accord with the 1959 Amendments to section 315(a) of the Communications Act by which Congress sought to give greater latitude to licensees in carrying out their journalistic role in political campaigns toward the goal of an informed electorate. We believe similar considerations call for broadcast licensees to have largely comparable freedom in determining the method of presenting the contrasting viewpoints as to personal attacks occurring in the news-type programs here exempted. The long-standing and fundamental obligation of the broadcast licensee to present news impartially provides the foundation upon which we rely in exempting these news-type programs from the precise requirements of the personal attack rules so as to eliminate any possibility of inhibitory effects.[5]

7. We have acted here to expand the exemption of program categories further along the lines of the ex-

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[5] We recognize that an argument can be made that news commentary or analysis within the bona fide newscast is exempted but comparable material is not exempted if broadcast outside one of the exempt program categories. The short answer is that we are following the line drawn by the Congress, which would also exempt a film clip of a candidate in, for example, a news analysis or commentary segment only if it comes within an exempt program. Further, while our action here exempts these categories upon the basis of the parallel to the 1959 Amendments and the absence of any pattern of abuse of fairness in these news areas, it is important to bear in mind that the action is taken as a precautionary step, to eliminate any possibility of inhibiting effects in these areas which were singled out by the Congress. We have found no such effects, and therefore stress that we are not saying or indicating that inhibition of robust, wide-open debate is appropriate or likely in areas other than those exempted here.

emption made on August 2, 1967 (FCC 67-923),[6] on the basis of the notice and the comments received in this docket (No. 16574). In urging the adoption of the 1959 Amendments, the Senate Report (No. 562) states (p. 14): "* * * the public interest should benefit from it. If not, adequate opportunity to remedy it is available." That is equally apt here, both from the standpoint of this revision and any other revisions which may be called for upon the basis of experience.

8. Authority for the rules herein adopted is contained in sections 4 (i) and (j), 303(r), and 315 of the Communications Act of 1934, as amended.

Accordingly, it is ordered, That the rule revisions as set forth below are adopted effective April 5, 1968. See section 4(c), Administrative Procedure Act. This proceeding is terminated.

(Secs. 4, 303, 315, 48 Stat., as amended 1066, 1082, 1088; 47 U.S.C. 154, 303, 315.)

Adopted: March 27, 1968.

Released: March 29, 1968.

FEDERAL COMMUNICATIONS COMMISSION,[7]

[SEAL] BEN F. WAPLE, *Secretary.*

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[6] While a further notice is not legally required, we considered the desirability of such a further notice. However, we believe that such a notice and further proceedings are unnecessary in light of the nature of our action and the grounds therefor (par. 3, supra), and would be undesirable in view of the uncertainty that would beset this important field during this critical election year period. Our present action also facilitates the earliest possible review of these rules—another highly desirable consequence.

[7] Commissioners Bartley's and Loevinger's dissenting statements and Commissioner Cox's concurring statement filed as part of the original document; Commissioner Johnson concurring in the result.

In Part 73 of Chapter I of Title 47 of the Code of Federal Regulations, §§ 73.123(b), 73.300(b), 73.598 (b), and 73.679(b) are revised to read identically as set forth below:

(b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 F.R. 10415. The categories listed in (iii) are the same as those specified in section 315(a) of the Act.

APPENDIX F

1. The relevant provisions of the Communications Act of 1934, 48 Stat. 1064, as amended (47 U.S.C. 151 *et seq.*), are as follows:

SEC. 4 [47 U.S.C. 154]:

* * * * *

(i) Duties and powers.

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

(j) Conduct of proceedings; hearings.

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

* * * * *

SEC. 303 [47 U.S.C. 303]:

Powers and duties of Commission.

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

* * * * *

SEC. 315 [47 U.S.C. 315]:

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable

> opportunity for the discussion of conflicting views on issues of public importance.
>
> (b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.
>
> (c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

2. The regulations under review appear in identical texts as 47 CFR §§ 73.123, 73.300, 73.598 and 73.679 (governing, in each case, a different class of broadcast station). The text is as follows:

> Personal attacks; political editorials.
>
> (a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.
>
> (b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of

paragraph (a) shall be applicable to editorials of the licensee.)

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315(a) of the Act.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

U.S. GOVERNMENT PRINTING OFFICE: 1968